IN THE

Supreme Court of the United States

October Term, 1945.

No. [redacted]

L. METCALF WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Petitioner,

vs.

H. REMINGTON GILLILAND, a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Allen v. Trust Company of Georgia, 90 L. Ed. Adv. Ops. 305; decided Jan. 28, 1946	16
Apex Hosiery Co. v. William Leader, 310 U. S. 469	18
Armour & Co. v. Wantock, 323 U. S. 126	13
Barreda v. Silsbee, 62 U. S. 146	15
Bramwell v. United States Fidelity & Guaranty Co., 269 U. S. 483	13
Davis v. Dept. of Labor of Washington, 317 U. S. 249	17
General Talking Picture Corp. v. Western Electric Co., 304 U. S. 175	15
Helvering v. Griffiths, 318 U. S. 371	17
Missouri v. Ross, 299 U. S. 72	18
Page v. Arkansas Nat. Gas Corp., 286 U. S. 269	16
S. S. Kresge Co. v. Sears, 87 F. (2d) 138; cert. den. 300 U. S. 670	15
Walling v. Alaska Pacific Consolidated Mining Co., 152 F. (2d) 812	14
Walling v. A. H. Belo Corporation, 316 U. S. 624	7, 11, 12, 14, 17, 18
Walling v. Harnischfeger Corporation, 325 U. S. 427	7, 9, 12, 16
Walling v. Helmerich & Payne, Inc., 323 U. S. 37	7, 8, 12, 14, 16
Walling v. Uhlmann Grain Co., 151 F. (2d) 381	13
Walling v. Youngerman-Reynolds Hardwood Company, 325 U. S. 419	7, 9, 12
United States v. Commercial Credit Company, 286 U. S. 63	16
United States v. Elgin, Joliet & Eastern R. Co., 298 U. S. 492	18
United States v. Flannery, 268 U. S. 98	17
United States v. McGowan, 290 U. S. 592	15

STATUTES.

Fair Labor Standards Act of 1938, Sec. 7(a)	1
Fair Labor Standards Act of 1938, Sec. 11(c)	1
Fair Labor Standards Act of 1938, Sec. 17	1

IN THE

Supreme Court of the United States

October Term, 1945.

No. 1018.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

vs.

HALLIBURTON OIL WELL CEMENTING COMPANY, a corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introductory Statement.

This action was instituted by the Administrator of the Wage and Hour Division, United States Department of Labor, under Section 17 of the Fair Labor Standards Act of 1938 to enjoin respondent from violating the overtime provisions (Sec. 7(a)) and the record keeping requirements (Sec. 11(c)) of the Act. By stipulation of the parties the charge of violation of the record keeping requirements was eliminated and the action was confined to respondent's field employees in California carried on its "contract" payroll subsequent to July 1, 1942 [R. 63, 66].

Each employee executed a formal written contract with respondent, of which the following is typical:

> "Employer agrees to employ Employee as a cementer and to pay Employee for his services a regular basic rate of 59 cents per hour for the first (40) hours of any workweek, and not less than one and one-half times such basic hourly rate of pay for all time over (40) hours in any workweek, with a guarantee that Employee shall receive for regular time and for such overtime as the necessities of the business may demand a sum not less than $63.46 for each workweek." [R. 455, 64, 33.]

By stipulation of the parties [R. 67] and the pre-trial order [R. 23] the issue for trial was limited to the question:

> Did the field employees receive compensation for their hours of work in excess of 40 hours in a week at rates not less than one and one-half times the regular rates at which they were employed?

From all the evidence the District Court found that "Each of said contracts was actually a *bona fide* contract of employment and was intended to and did really fix the regular rate at which each of the respective field employees was employed" [R. 34] and that "each field employee was compensated and paid by defendant in accordance with the terms of the written contract"; that "for each hour worked in excess of 40 in each workweek . . . each field employee received from defendant as compensation an amount equal to or in excess of an amount one and one-half times the hourly rate specified in the written contract of employment"; that "defendant agreed to employ and did employ, and each field employee agreed

to be employed and was employed, at the hourly rate specified as the basic regular hourly rate in the written contract . . ." [R. 34, 35]. The District Court denied an injunction and dismissed the complaint. The Circuit Court of Appeals for the Ninth Circuit concurred in the findings and holding of the District Court and affirmed the judgment.

The opinion of the District Court [R. 24-29] is reported at 57 Fed. Supp. 408. The opinion of the Circuit Court of Appeals with dissenting opinion [R. 480-483] is reported at 152 F. (2d) 622.

Question Presented.

The issue in this case as settled by the parties and court order is whether or not overtime hours were compensated at rates not less than one and one-half times the regular rates of pay. The ultimate question is:

> Is the regular basic hourly rate specified in the employment contracts the "regular rate" of pay upon which overtime compensation is to be computed under Section 7 of the Fair Labor Standards Act of 1938?

Statement.

Petitioner's statement is not sufficiently complete or accurate to give a true picture of the factual situation.

Respondent is engaged in the business of oil well servicing—cementing, testing and surveying oil wells, renting tools and equipment to persons engaged in the drilling or operation thereof and furnishing skilled employees to operate the equipment. The employees involved are referred to as "field employees" and consist of cementers, testers, electric survey operators, drivers and field mechanics. Their work is not at a fixed establishment but at

SUBJECT INDEX.

	PAGE
Introductory statement	1
Question presented	3
Statement	3
No good grounds for certiorari are shown by the petition	7

wells in the field located 35 or 40 miles from the camp or base [R. 424]. The oil well must be cemented, tested or surveyed at a time specified by the owner or operator and respondent has no control over the volume of work nor the time when it must be done. The volume of work and the hours of employment are not uniform but fluctuate widely from week to week [R. 306, 309, 226]. The employees who perform the servites and operate the tools are trained men and additional skilled labor is not obtainable in busy periods. In slack periods the men are retained on the payroll. There was no normal or regular number of hours worked in a workweek as the hours worked fluctuated for each employee from a few to a number in excess of 100. While long hours are shown on the payroll records in some weeks for some employees, this does not mean that such employees were working in the usually accepted meaning of that term. Many of the hours recorded as hours worked consisted of waiting on the well location (from 2 to 16 hours) while the drilling crew runs the casing; waiting while perforation work is done by another company and waiting (for 24 hours or more) while the testing tool is in the well hole. The employee may spend such waiting time in resting, or even in engaging in recreational pursuits nearby provided he leaves word where he can be reached by the well owner or operator when needed. In sample periods, 6,208 hours were spent by the employees waiting on location as compared with 11,142 hours spent in running the job [Exhibit "41," R. 354]. The hours designated as running the job include waiting time on location after the job has commenced [R. 430, 438]. Other idle time recorded as hours worked is time spent at the camp or base when there is nothing to do [R. 295, 436, 452].

In July 1942 each field employee and the Company executed an employment contract in letter form, [R. 63]. These were superseded in August 1942 by formal written contracts executed by each field employee [R. 64], the pertinent part of which has been quoted hereinabove.

The amount of the weekly guarantee was sufficient to pay for 40 hours at the regular hourly rate and for 44 additional hours at one and one-half times the regular rate. The Company could not have afforded to pay the amount of the weekly guarantee as weekly salaries compensating for straight time only [R. 470]. The amounts of the weekly guarantees were not the same as the salaries previously paid and in many instances were substantially higher [R. 315, 316].

During the period from July 1942 to January 1944, the field employees were paid semi-monthly since respondent's records and reports were based on a calendar month, calendar quarter or calendar year and it enabled the employees to meet installments on homes, automobiles and insurance. To save computation, the weekly guarantee was translated into an equivalent monthly guarantee by a method of computation approved by the Administrator [Interpretative Bulletin No. 4, Par. 10, R. 235, 376]. The total hours worked in a workweek were shown on the payroll records and the number of overtime hours worked was readily ascertainable by merely subtracting 40 from the total hours worked. By pre-trial stipulation all issues with respect to record keeping were eliminated from the case [R. 66-67]. Since January, 1944 the field employees were paid bi-weekly [R. 64; 330] and payroll records were kept on a weekly basis, showing all items in detail [R. 120].

There was a total of 4,284 man weeks during the period here involved [R. 226]. Overtime hours were worked in 86% of the total workweeks [R. 381]. In 20% of the total workweeks the hours worked exceeded those paid for by the weekly guarantee [R. 384] and such excess hours were compensated at a rate of one and one-half times the hourly rate specified in the employment contract [R. 333]. Such manner of compensating respondent's employees was entirely different than the method of payment prior to the time of enactment of the Fair Labor Standards Act. In the few instances where an employee did not work a full workweek he was compensated at the agreed hourly rate for the first 40 hours and at a rate not less than one and one-half times such hourly rate for all overtime hours, or a prorata amount of the weekly guarantee, whichever was the greater [R. 185; 186; 341-350; 351; 379; 380].

Incomplete and disconnected statements from instructions to respondent superintendents are contained in the petition (pp. 4 and 5) which fail to give their true meaning when thus detached from their context. The instructions attempted to explain the use of the monthly equivalent of the weekly guarantees on the semi-monthly payrolls. The instructions expressly direct that the employees shall be compensated for the first 40 hours at the agreed hourly rate and for all overtime hours at a rate at least one and one-half times the regular hourly rate, or the amount of the weekly guarantee, whichever is the greater [R. 78].

No Good Grounds for Certiorari Are Shown by the Petition.

We will consider the three grounds upon which the petition is based in the order set forth in the petition.

1. The decision of the Circuit Court of Appeals in this case is not in conflict with the decisions of this Court in *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, *Walling v. Youngerman-Reynolds Hardwood Company*, 325 U. S. 419, or *Walling v. Harnischfeger Corporation*, 325 U. S. 427. The employment contract here involved is entirely different from the contracts and methods of payments involved in the three cases last cited. The employment contract in this case is the same type and almost identical with the employment contract which this Court held valid in *Walling v. A. H. Belo Corporation*, 316 U. S. 624. In the *Belo* case the contract was contained in a letter from the employer to the employee which stated:

> ". . . we advise that from and after October 24, 1938, your basic rate of pay will be . . . 67 . . . cents per hour for the first forty-four hours each week and that for time over forty-four hours each week you will receive for each hour of work not less than one and one-half time such basic rate above mentioned, with a guaranty on our part that you shall receive weekly for regular time and for such overtime as the necessities of the business may demand, a sum not less than $40 . . ." (316 U. S. 628.)

A comparison of the Belo contract with the contract here involved demonstrates their practical identity.

In its written opinion the District Court, the Honorable J. F. T. O'Connor, Judge Presiding, said:

> "A careful examination of the contract between the defendant and its employees brings this action

within the ruling of the Supreme Court of the United States in Re Walling v. A. H. Belo Corporation, 316 U. S. 624, 62 S. Ct. 1223, 86 L. Ed. 1716." [R. 28; 57 Fed. Supp. 408, 410.]

The Circuit Court of Appeals for the Ninth Circuit in affirming the judgment below said:

> "Faced with a wage agreement not substantially differing from the one before us, the Supreme Court, in Walling v. A. H. Belo Corporation, *supra*, reached a conclusion with which the decision below conforms. The Administrator argues that in subsequent decisions the Belo case has been whittled down to a very narrow compass. However, in these later cases the Court has carefully and consistently refrained from overruling the earlier decision or denying its continued authority. Counsel for the Administrator has not been able to point out any substantial distinction between the Belo case and the present, nor have we been able to discern any difference in principle." [R. 481; 152 F. (2d) 622, 623.]

The *Helmerich & Payne* case involved the split-day plan. In each shift or tour, one-half of the hours worked were paid for at a specified rate and the other one-half of the hours worked were paid for at one and one-half times such rate. Overtime compensation was computed on the lower of the two rates, notwithstanding that the compensation paid for the first 40 hours was at a higher rate. By reason of these facts this Court held the contract invalid. It was to this state of facts that the Court directed its statements from which petitioner here makes partial and disconnected quotations. The contract involved in the *Helmerich & Payne* case differed from the type of contract involved in the *Belo* case and here involved. This Court

expressly distinguished the case from the *Belo* case, stating:

> "Nothing in this Court's decision in Walling v. A. H. Belo Corp., 316 U. S. 624, 86 L. Ed. 1716, 62 S. Ct. 1223, *supra*, sanctions the use of the split-day plan."

The *Youngerman-Reynolds* and *Harnischfeger* cases were considered together by this Court.

In the *Youngerman-Reynolds* case, notwithstanding a specified hourly rate, the employees actually were compensated for regular and overtime hours on a piece-rate basis which was higher than the specified hourly rate. As stated by this Court in that case, "It is thus apparent that the guaranteed piece rates would yield greater returns on an hourly basis for both regular and overtime work and that they would actually be the rates paid." In the *Harnischfeger* case the contract provided for a basic hourly rate, plus an incentive bonus or piecework earnings. The incentive bonus was paid for work during the first 40 hours of the workweek and this Court properly held that such incentive bonus was part of the regular rate of pay upon which the overtime rate must be computed. In discussing the *Youngerman-Reynolds* case, this Court expressly distinguished the type of employment contract there involved from that involved in the *Belo* case, stating:

> "This Court's decision in Walling v. A. H. Belo Corp., 316 U. S. 624, 86 L. Ed. 716, 62 S. Ct. 1223, lends no support to respondent's position."

Petitioner asserts that the employment contracts here involved enabled respondent to avoid paying increased labor costs for the first 44 hours of overtime worked (p.

9). This statement can take semblance of verity only if it is first assumed (contrary to the fact) that there was no agreement for employment at an hourly rate and that the weekly guarantee paid for straight time only. The fact is that the employee and respondent agreed that the weekly guarantee paid for the first 40 hours at the agreed regular hourly rate and for 44 overtime hours at a rate of one and one-half times the agreed regular hourly rate. The employment contract further provides for the payment of compensation at the rate of one and one-half times the agreed regular hourly rate for every hour worked in excess of those paid for by the guarantee. Compensation of the employee in accordance with the employment contract results in at least a 50% increase of labor costs for each overtime hour worked. This is true whether the overtime hours are those within the number paid for by the weekly guarantee or are hours in excess of such number. In a substantial number of workweeks—one out of every five—hours were worked in excess of those paid for by the guarantee [R. 384]. For every such hour the employee received compensation in addition to his weekly guarantee at a rate of one and one-half times the hourly rate specified in the employment contract [R. 333]. The payment of such compensation, in addition to the weekly guarantee, at the rate of one and one-half times the hourly rate specified in the contract, is consistent only with the premise that the agreed hourly rate was the regular rate at which the employee was employed. It would be inconsistent with petitioner's contention that the guarantee was a weekly salary which paid for all hours worked at straight time, since under the irregular workweek plan the additional compensation would be only at one-half times the hourly rate. In the instant case the number of work-

weeks in which compensation was paid in addition to the weekly guarantee is substantially greater than existed in the *Belo* case. In the *Belo* case only 71 weeks out of a total of approximately 1100 weeks, or 6.4% of the total workweeks, were weeks in which hours were worked in excess of those paid for by the weekly guarantee [*Belo*, R. 194-337]. In the instant case 856 weeks out of a total of 4,284 weeks, or 20% of the total workweeks, were weeks in which the hours worked exceeded those paid for by the guarantee [R. 384]. All of such hours were paid for at one and one-half times the agreed hourly rate [R. 333].

Petitioner asserts that an "84-hour week bore no relation to the regular or usual number of hours worked by the employees under consideration" (p. 31). Here the employees worked an irregular workweek and there was not and could not be a regular or usual number of hours worked. The fluctuation in hours worked in a week ranged from a few to well over 100 [R. 226]. The weekly guarantee provided in the contracts in the *Belo* case paid for 54½ hours but that was not the regular or usual number of hours worked. The usual workweek for the Belo employees was around 48 hours for the men and 44 hours for women [Belo, R. 63-64].

Petitioner's main argument is directed to the fact that the weekly guarantee was paid in weeks in which 40 hours or less were worked. Respondent was obligated to make such payments by the terms of its contract. The same provision, in identical language, was contained in the employment agreements of the *A. H. Belo Corporation* (316 U. S. at 628). The evidence in the *Belo* case showed that the weekly guarantee was paid in workweeks in which the

number of hours worked were 40 or less. In the *Belo* case the number of weeks in which the weekly guarantee was paid, where no overtime hours were worked, was 20% of the total workweeks, while here it is only about 14% [R. 381]. Petitioner concedes that the same situation existed in the *Belo* case (p. 13, n. 3) but claims that the significance was not fully appreciated and that the Court's attention was not directed to it. We believe that without having its attention called to it this Court would realize that under the terms of the contract the *Belo Corporation* was obligated to pay the weekly guarantee in weeks in which 40 hours or less were worked. In both the opening brief and the closing brief of the Administrator in the Circuit Court of Appeals for the Fifth Circuit[1] this fact was repeatedly brought to the attention of the Court and used as the basis of argument. Reference to this fact was also made in the Administrator's brief in this Court. In the *Belo* case the opinion of the Circuit Court of Appeals was before this Court and reference was there made to the fact (121 F. (2d) at 210, n. 6). Furthermore, in the *Belo* case the Administrator filed a petition for rehearing in this Court (317 U. S. 706) and thus was afforded an opportunity to enlighten this Court on the point.

Petitioner's first ground for the issuance of a writ of *certiorari* is based upon incomplete and detached excerpts from general language in the opinions of this Court in the *Helmerich & Payne*, *Youngerman-Reynolds* and *Harnischfeger* cases, disregarding that such language was

[1]The transcript and the Administrator's briefs in the Circuit Court of Appeals and in this Court in the *Belo* case are a part of the record in this case [R. 321; 323]. They are not reproduced in the printed transcript but were considered by the Circuit Court of Appeals in their original form [R. 479].

directed to entirely different types of employment contracts and which this court expressly recognized as being different. The petitioner has failed to heed the admonition of this Court that "words of our opinions are to be read in the light of the facts of the case under discussion" and that "General expressions transposed to other facts are often misleading" (*Armour & Co. v. Wantock*, 323 U. S. 126; *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U. S. 483).

2. The decision in this case is not in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Walling v. Uhlmann Grain Co.*, 151 Fed. (2d) 381. The petition states that the wage plan involved in the *Uhlmann* case is "virtually the same as the one here in question" but this is not true. In the *Uhlmann* case there was no employment contract signed by the employees. There was merely a notice that the employees would be on call for 60 hours in each workweek. There was no guarantee. The notice merely stated "This rate of pay, including overtime, if any, should equal or exceed the compensation you have received from us in the past" (151 F. (2d) 1382, n. 1). The important distinction between the *Uhlmann* case and this case is that the wage plan in the *Uhlmann* case was never put into effect. When the employees worked in excess of 60 hours in a workweek, they received no compensation in addition to their weekly pay. As stated by the Circuit Court of Appeals in the *Uhlmann* case ". . . the amount of compensation received by an employee was the same, irrespective of the number of hours worked. Overtime work resulted in no additional compensation." (151 F. (2d) 383.) Here each employee executed a formal written contract, there

was a weekly guarantee and the wage plan actually was put into effect and strictly adhered to. In each of the above-mentioned matters the instant case is like and the *Uldmann* case is unlike the factual situation in the *Belo* case.

The decision of the Circuit Court of Appeals for the Ninth Circuit in *Walling v. Alaska Pacific Consolidated Mining Co.*, 152 F. (2d) 812, involved a different type of contract and factual situation than here involved and affords no ground for granting *certiorari* in this case. That case involved a "split day" plan like that involved in the *Helmerich & Payne* case which is different than the wage plan here involved and different than the wage plan involved in the *Belo* case. The *Alaska Pacific* case was decided by the Circuit Court of Appeals for the Ninth Circuit ten days prior to its decision in the instant case. The two decisions show the distinction between the wage plan here involved and the split-day plans involved in the *Alaska Pacific* and *Helmerich & Payne* cases.

3. As a final ground for granting *certiorari* the petition states that for a period after the decision of this Court in the *Belo* case, the District Courts "tended to uphold" wage plans "which superficially" resembled the *Belo* contract but actually were different. The Administrator concedes that "This development was arrested by the later decisions of this Court" (p. 17). All of the cases cited by petitioner under this point involved wage plans substantially different than the wage plan here involved and the wage plan involved in the *Belo* case. The wage plan here involved is the same as that involved in the *Belo* case and its validity settled by this Court's decision in that case. This case presents no vehicle for an exposition by

this Court as to what other different wage plans are valid or invalid. To attempt to do so would result in mere *dictum*. If the Administrator desires a decision of this Court that a particular different plan is invalid such decision should be made in a case involving such different plan.

The writ of *certiorari* should not issue to review the evidence or the inferences drawn from it. The District Court found that during the period involved, each employee was paid in accordance with his employment contract; that he received for every overtime hour compensation at a rate at least one and one-half times the regular hourly rate specified in his contract. The Court found that for every hour worked in a work-week in excess of those paid for by the guarantee the employee received compensation in addition to his guarantee at the rate of one and a half times the agreed regular hourly rate [R. 35]. Both Courts found each of the contracts was actually a *bona fide* contract of employment and was intended to and did really fix the regular rate at which each employee was employed [R. 34; 481]. Such findings based upon the writing and extrinsic evidence are findings of fact (*Barreda v. Silsbee*, 62 U. S. 146; *S. S. Kresge Co. v. Sears*, 87 F. (2d) 138, 140, cert. den. 300 U. S. 670). The petitioner here asks this Court to review the evidence and the possible different inferences deducible therefrom. A writ of *certiorari* should not issue to review the evidence, particularly where, as here, the findings of fact are concurred in by both lower courts.

General Talking Picture Corp. v. Western Electric Co., 304 U. S. 175, 178;

United States v. McGowan, 290 U. S. 592;

United States v. Commercial Credit Company, 286 U. S. 63, 67;

Page v. Arkansas Nat. Gas Corp., 286 U. S. 269, 271;

Allen v. Trust Company of Georgia (U. S.), 90 L. Ed. Adv. Ops. 305 at 308, decided January 28, 1946.

In the case last cited the Court said:

> "Here two courts have resolved that question of fact in favor of respondents. . . . Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination of the evidence. See United States v. O'Donnell, 303 U. S. 501, 508, 82 L. Ed. 980, 984, 58 S. Ct. 708, and cases cited."

The demarcation between valid and invalid wage plans under the Fair Labor Standards Act of 1938 is now fairly well settled by the decision of this Court in the *Belo* case and in the later decisions of this Court in the *Helmerich & Payne*, the *Harnischfeger* and the *Youngerman-Hardwood Company* cases. A change of decision at this time would result in uncertainty, confusion and extensive litigation. The employment contracts here involved were negotiated upon the faith of and in reliance upon the decision of this Court in the *Belo* case [R. 401] and undoubtedly other like contracts were executed in reliance upon that decision. It would be most inequitable for a change in decision to operate retroactively and subject one of the parties to multiple litigation and extensive liability. Even if it were of questionable soundness the decision of this Court in the *Belo* case should be adhered to

in order to avoid confusion and unfortunate practical results from a change.

Helvering v. Griffiths, 318 U. S. 371, 403;
Davis v. Dept. of Labor of Washington, 317 U. S. 249, 255;
U. S. v. Flannery, 268 U. S. 98, 105.

The decision of this Court in the *Belo* case is sound and the type of employment contract involved in that case and here involved is not violative of the provisions of the Fair Labor Standards Act of 1938. As stated by this Court in the *Belo* case "the guaranty contract in this case carries out the intention of the Congress. It specifies a basic hourly rate of pay and not less than time and a half that rate for every hour of overtime work beyond the maximum hours fixed by the Act," and that "Congress has said nothing to prevent this desirable objective" of "the security of a regular weekly income." These statements are as true today as on the date of their pronouncement.

That the decision of this Court in the *Belo* case accords with the intention of the Congress in enacting the Fair Labor Standards Act of 1938 is evidenced by the fact that the Congress has acquiesced in such construction of the statute and has refrained from amending the Act so as to require a different result. There has been abundant opportunity for the Congress to give further expression to its will and it is well known that many bills have been introduced in the Congress to amend the Fair Labor Standards Act. No Amendment has been adopted which would require a different result than expressed in the decision of this Court in the *Belo* case. This Court's construction of the Act should be adhered to, leaving it to

the Congress to amend the law should it deem a change necessary or desirable.

Apex Hosiery Co. v. William Leader, 310 U. S. 469, 487;

Missouri v. Ross, 299 U. S. 72;

United States v. Elgin Joliet & Eastern R. Co., 298 U. S. 492, 500.

We believe that the record warrants the conclusion that this suit was instituted and the petition here was filed for the sole purpose of relitigating in this Court the question of law involved and settled by this Court in the *Belo* case. At the trial in the District Court, petitioner's attorney stated "We say if he has the guarantee he simply is not employed at the hourly rate" [R. 212]. The petition here states at page 17 ". . . that the *Belo* type of contract by its very nature tends to defeat the purpose of Section 7," and at page 18 "These aspects of the *Belo* contract seem inconsistent in principle with this Court's subsequent opinions." The various grounds upon which the Administrator attacks the wage plan in this case existed also in the *Belo* case. Substantially the same arguments here made by the Administrator were made in the *Belo* case and determined by this Court in its decision in that case. The primary arguments contained in the petition for the granting of *certiorari* are to the effect that the decision of this Court in the *Belo* case is erroneous. A writ of *certiorari* should be allowed only when an important question of Federal law "has not been . . . settled by this Court" [Rule 38 (5) (b)]. The writ should be denied where this Court already has settled the question of law. The decision of this Court in the *Belo* case was made in 1942 and has been recognized as established law in sub-

sequent decisions of this Court involving other wage plans. While the doctrine of *stare decisis* is not rigid, it is an important principle of our jurisprudence and social policy. Our system of law is based upon the formulation of and adherence to principles that will impart stability to and predictability of judicial discretion.

We respectfully submit that no good ground has been shown for the issuance of a writ of *certiorari* in this case and that the petition therefor should be denied.

Respectfully submitted,

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